SUPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 10

WILLIAM GIGLIO and FRANK LIVORSI,
Petitioners,
v.
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

JAMES B. BURKE,
Counsel for Petitioners.

HAROLD W. WOLFRAM,
JOSEPH LEARY DELANEY,
Of Counsel.

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I.

THE PETITIONERS WERE WRONGFULLY DEPRIVED OF AN OPPORTUNITY TO ASCERTAIN WHETHER TAINTED EVIDENCE WAS USED AGAINST THEM AT THE TRIAL OR IN ORDER TO INDICT

The respondent contends that the defendants were entitled to a hearing as to the sources of evidence used at the trial but did not ask for it, while they were not entitled to the hearing, which they did request, with respect to the sources of evidence used to indict. The defendants sought, and were wrongfully denied, a hearing regarding the sources of the evidence used at the trial and to indict.

A. The Defendants Demanded, and Were Refused, a Hearing With Respect to the Sources of Evidence Used Against Them at the Trial

The respondent has assumed (Gov. Br. No. 10, p. 20) that Judge Goddard's decision dismissing the 1952 indict-

ments, on the ground that some evidence before the grand jury had been obtained in violation of the Fifth Amendment, was enough to bring into operation, so far as evidence introduced at the trial was concerned, the rule of *Nardone* v. *United States*, 308 U. S. 338. The respondent has conceded (Gov. Br. No. 9, pp. 60-1) "that under the circumstances" there was "a right to cross-examine for the purpose of discovering the sources of the evidence used *at the trial*." The respondent adds, however (Gov. Br. No. 10, p. 20), that the petitioners "were in fact accorded every opportunity they sought to determine the sources of evidence used *at the trial* * * *." We shall demonstrate that the petitioners, in fact, sought and were deprived of this very right.

In denying defendants' motion for a preliminary hearing (a) to determine whether tainted evidence had been used before the grand jury and (b) to determine the scope of a suppression order to prevent its further use (R. 26-7), Judge Palmieri, in effect, referred to the trial judge the question of the government's use of tainted evidence at the trial (R. 183). At the outset of the trial, Mr. Stryker advised the trial judge that Judge Palmieri had specifically referred to him "the question of the leads and clues * * *" (R. 245).* Both the trial judge and defendants' counsel finally agreed that the issue involved "the suppression *for use at the trial* of in any subsequent time of the improperly obtained material" (R. 246). [Emphasis added]

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*In this recital, we have limited ourselves to the defendants' repeated requests for a hearing with respect to the sources of evidence used against them at the trial. The defendants also sought a hearing with respect to the sources of evidence used to indict. In some instances, both objectives were discussed simultaneously. The respondent refers (Gov. Br. No. 10, pp. 21-6) to several instances where defendants' counsel was pursuing the latter objective and argues that defendants did not attempt to inquire with respect to the sources of evidence used at the trial.

During the cross-examination of Roth, counsel for defendants reminded the trial court that the issue of "leads and clues" had been referred to it by Judge Palmieri (R. 1321). In the ensuing argument, the prosecutor (R. 1353) characterized the problem as one relating to "the admissibility of evidence * * *" (R. 1353). He called upon the defendants to establish a further foundation than that presented to Judge Palmieri and requested that it be done outside the presence of the jury (R. 1353). The trial judge stated (R. 1354) that he saw "no greater basis for my conducting a hearing than there was for Judge Palmieri conducting one," and added these significant words which relate to the sources of evidence used at the trial and not before the grand jury: "* * * as I recall the record that has been made before me, I see no basis yet at all for assuming—or I see no possibility of proving the use of these books," referring to the records produced by the defendants before the grand jury. Whereupon the following colloquy occurred (R. 1354):

> "Mr. Wolfram: Isn't it a fact, your Honor, that the only way we can establish whether leads and clues have stemmed from the illegal seizure is through the witnesses as they are presented to us?
>
> The Court: Well, it would all come through the witnesses as they are presented to us or the exhibits themselves. I think if you look at the over-all record, I think perhaps—I mean, I will say as the record nears completion, you will have a pretty good picture of where the Government got its evidence from."

This exchange, which demonstrates that defendants' counsel, the prosecutor and the court were discussing the use of tainted evidence at the trial, was followed by the prosecutor's observation relating to the same problem, for he stated (R. 1354) that he did not object "at all to counsel inquiring of Mr. Roth about the documents that he saw."

The court, however, ruled flatly (R. 1354): "* * * I don't want to get off into this question of documents, even though you might have no objection to it." The court repeated (R. 1356) that it would hold "now that in the absence of any further foundation, I am not going to go off into the use of these records before the jury, and I am not going to conduct any side hearing at this time either, because that in itself wouldn't be very feasible."

The trial judge, in no uncertain terms, had refused to permit the defendants to interrogate a government witness concerning the prosecutor's use of tainted evidence at the trial. He refused to accord the defendants such a hearing "before the jury" or to hold a "side hearing" on the issue.

The defendants attempted to pursue a similar inquiry with Theodore Present, the government's accountant. At this point (R. 1943), the prosecutor requested a conference. During the course of the ensuing colloquy, the following exchange occurred between court and counsel, relating specifically to the use of tainted evidence at the trial (R. 1944-5):

> "Mr. Wessel: It presents a preliminary question as to the admissibility of evidence, as to the suppression of these leads and clues. That kind of a question is not for the jury; it is for the Court.
>
> * * *
>
> * * * and as far as foundation is concerned, there is no further evidence here than there was before Judge Palmieri.
>
> Mr. Stryker: I can't lay a foundation except start laying.
>
> The Court: No. Judge Palmieri said there wasn't enough foundation to start laying one, or at least to take the time of this court to progress any further with it, and I think that is about the way I feel about it. I am not going into the subject on the basis of what we have had so far."

The trial judge, shortly thereafter, observed that he did not "recall anything that could have been developed from improper records that has come before the jury yet, but I may be wrong on that * * *" (R. 1957). After referring to defendants' motion to dismiss the indictment, the court said (R. 1958):

> "Now, it seems to me that here I have the additional question of making sure there is nothing that has come before this jury, this trial jury, which could be attributed to improperly secured records."

After he turned to the prosecutor for confirmation, the following colloquy occurred (R. 1958-9):

> "Mr. Wessel: Yes, your Honor.
>
> The Court: That is what I want to be sure of.
>
> Now, you wanted to have a hearing at this time outside the presence of the jury. Before I take that time, I would like to know what foundation there is for it, and I would like for both counsel to let me have it."

As part of the defendants' motion to dismiss at the close of the government's case, Mr. Stryker maintained (R. 2077) that defendants were entitled to interrogate all of the government's witnesses concerning the evidence used before the grand jury. The following colloquy ensued (R. 2077-8):

> "The Court: That goes to the motion before Judge Palmieri, but what I am interested in now, is there anything in this trial before this jury that has been improperly obtained? That I regard as my primary responsibility.
>
> Mr. Stryker: Well, let me reply to that.
>
> The Court: Yes.
>
> Mr. Stryker: The point was really that we were not able to find out whether those things were improperly

> obtained or not. As the record stands, it is not clear, but we were not allowed, not permitted to inquire into the fact. That is the point, and the difficulty in which we find ourselves is due to the fact that Judge Palmieri remitted that issue which he did not decide, or permit us to obtain evidence or secure evidence or cross examine witnesses, which, in my judgment, would have given him a basis for it, so that the matter was, of necessity, thrown into this trial, which I think it should not have been.
>
> The Court: What he said was, I think, that there was no adequate foundation before him for such a hearing.
>
> Now, if an additional foundation developed before me, why, then, I would reconsider it, as, of course, I would. We would then have a new situation."

This colloquy is significant for several reasons. In the first place, defendants' "experienced trial counsel" (Gov. Br. No. 10, p. 5) flatly asserted to the court that he had not been permitted to inquire into the fact that there was "anything in this trial before this jury that has been improperly obtained." In the second place, the trial judge, "who had been alerted to the problem from the start" (Gov. Br. No. 10, p. 35), did not take issue with him. In the third place, the trial judge expressly stated his *reason* for refusing the defendants the right to interrogate regarding the sources of evidence used at the trial, namely, that there was no adequate foundation for such a hearing.*

Defendants' counsel then read to the trial judge (R. 2078) from the minutes of the argument before Judge Palmieri, during the course of which the prosecutor had

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*The government's concession, in this Court, that defendants were entitled to a hearing as to the sources of evidence used at the trial (Gov. Br. No. 9, pp. 60-1) flatly repudiates the trial court's holding that there was no foundation for such a hearing (R. 1356, 1945, 2078, 2136).

urged that defendants' motions (to suppress evidence and for a hearing to determine the scope of the suppression order) be referred to the trial. The trial judge then requested (R. 2081) that defendants' counsel point to anything in the trial record which suggested that the government had obtained evidence by improper leads and clues, to which Mr. Stryker again responded (R. 2081-2):

> "And here appear these witnesses, and their documents. Now, where did the Government get that information. I haven't proved where they got it because, as I understand the ruling, I was not allowed to go into that inquiry * * *."

Here again, the trial judge failed to take issue with counsel's statement. After some further discussion, the court ruled (R. 2085):

> "The Court: All right, Mr. Stryker, I will briefly state that I think on the record before Judge Palmieri, his determination is the law of the case. Even if it weren't, upon that record as I have gained knowledge of it through the trial and the arguments of both of you, I would decide it exactly as he did.
>
> * * *
>
> I find nothing in the record of this trial which suggests any use of illegal clues. I find, and as I hear your summary of argument today, I don't think you have a thing more than you had before Judge Palmieri."

Counsel for the defendants then observed (R. 2086):

> "Your Honor won't permit me, I am sure, to call all the affiants in those moving papers and cross examine them with respect to this issue."

The court agreed that it would permit no such inquiry (R. 2087). The defendants nevertheless called Gerome J. Leone, the Assistant United States Attorney who had pre-

sented the case to both the 1952 and 1953 grand juries and at whose direction the tainted evidence had been produced by the defendants. The court ruled out all questions directed to this witness, concerning leads and clues employed by the government at the trial, in the following colloquy (R. 2136):

> "Mr. Wolfram: And your Honor's ruling covers the question of being able to ask this witness anything about leads and clues *or* what was presented to the grand jury?
>
> The Court: That's right. If you have any better foundation for that, you come back." [Emphasis added]

The court ruled at this point, as it had consistently throughout the trial, not only that no inquiry would be permitted regarding what occurred before the grand jury, but also that none would be allowed concerning the sources of evidence used by the government at the trial.

B. The Burden of Proving the Independent Source of the Evidence Was on the Government

The defendants were deprived of their unquestioned right to ascertain whether tainted evidence was being employed against them at the trial. Furthermore, *United States* v. *Goldstein*, 120 F. 2d 485 (2 Cir., 1941) and *United States* v. *Coplon*, 185 F. 2d 629 (2 Cir., 1950), neither of which are mentioned in respondent's submission, require the government, under the circumstances presented here, to establish that the information gained through the violation of the defendants' privilege against self-incrimination did not lead, directly or indirectly, to the discovery of any of the evidence introduced at the trial. (See Pet. Br. No. 10, pp. 22-4, 28-9.) The defendants did not have the burden of proving the contrary.

When the defendants invoked the aid of the district court, on a preliminary motion, for an order "suppressing

the use of all memoranda, work sheets, photostats, copies, notes and all leads and clues obtained by the Government from the defendants' books and records produced before the grand jury in violation of their constitutional rights under the Fifth Amendment, and from the defendants' oral testimony before the grand jury" (R. 26) and for an order "directing a hearing to ascertain the scope and extent of the suppression order * * *" (id.), and renewed the application at the trial (R. 245-6), the government was called upon to establish the independent source of its evidence. This it signally failed to do.

C. The District Court Did Not Afford the Defendants Any Procedural Safeguards Against the Use of Tainted Evidence

The respondent lists seven "safeguards" which it claims were accorded the petitioners at the trial (Gov. Br. No. 10, p. 28). The only "safeguard" of any consequence is one which the petitioners, as we have demonstrated, were never accorded, namely, "every opportunity to examine when their purpose was to ascertain the source of trial evidence * * *" (id.).

All of the other "safeguards" mentioned by the respondent proceed on the naive assumption that, because the tainted documentary evidence had been returned to the defendants, they and the court were in a position, at the trial, to recognize the source of evidence offered by the government. A tainted document may give the prosecutor a lead or clue which, in turn, may develop into a witness or documentary evidence used at the trial without the defendant or the court being aware of its contaminated source. The trial judge's insistence that the defendants establish a further foundation, his invitation to the defendants to call to his attention anything in the record which they regarded as tainted, his repeated reference to the fact that he could

find "nothing in the record of this trial which suggests any use of illegal clues" (R. 2085), all rested on the false premise that leads and clues obtained by the government from the tainted evidence would bear a readily recognizable insignia which could be identified without further inquiry. Not only did the court thus place the burden of proving the taint upon the defendants instead of upon the government, but it prevented the defendants from sustaining that burden by refusing to permit them to conduct a cross-examination of witnesses tendered by the government or a direct examination of the witnesses whom they desired to call (R. 2086).

D. The Defendants Were Wrongfully Deprived of an Opportunity to Ascertain Whether Tainted Evidence Was Presented to the Grand Jury Which Indicted Them

It is precisely because there is "no confrontation, no cross-examination, no adversary frame-work to screen the evidence which may be considered" (Gov. Br. No. 10, p. 14) that a defendant whose constitutional privileges are violated before a grand jury is entitled to the assurance that the tainted evidence will not be used either before that grand jury, or any other, as the basis for an indictment. Neither *Holt* v. *United States*, 218 U. S. 245, nor *Costello* v. *United States*, 350 U. S. 359, cited by the respondent (*id.*) involved unlawful conduct *before the grand jury*. Here the defendants' rights were violated in the grand jury room.

The holding below sanctions a thoroughly unconscionable procedure. It stands for the proposition that a prosecutor may invoke the terrifying power of a grand jury by calling not only a witness or a prospective defendant, but one who is actually a defendant in a pending criminal case, to procure tainted evidence in violation of his constitutional

privilege against self-incrimination for use before another grand jury in order to secure, without challenge, an indictment which might not otherwise have been obtained. " * * * if judicial inquiry as to the circumstances under which the evidence * * * was acquired in this case could be cut off [without a trial], it would afford the opportunity for shocking administrative conduct."*

II.

THE VERDICT AGAINST LIVORSI CANNOT BE SUSTAINED

The respondent's brief fails to justify the concurrent five-year prison sentence imposed upon the defendant Livorsi for attempting to evade his 1946 individual income tax by filing a false return (Count 6) and for attempting to evade payment of his tax by concealing his assets in the Southern District of New York (Count 8); the additional five-year sentence for concealing corporate assets (Count 9); and the additional five-year sentence for conspiracy (Count 10).

A. No Element of the Crime of Concealment Was Committed in the Southern District of New York

The respondent's discussion of Count 8 is relegated to a footnote (Gov. Br. No. 10, pp. 36-7) in which, with obvious lack of conviction, it states: "We think there was evidence of overt acts within the Southern District of New York, which, taken together with proof of overt acts committed elsewhere, was sufficient to support the verdict on Count 8." The critical issue is not whether "there was evidence of overt acts" which occurred within the Southern

*In *Lapides v. United States*, 215 F. 2d 253, 261, the late Judge Jerome Frank quoted, with approval, in his dissent, this language from Lapides' brief.

District of New York, but whether an essential element of the crime of concealing assets was committed there.

Yenkichi Ito v. *United States*, 64 F. 2d 73 (9 Cir., 1933) illustrates this vital distinction. There, the appellant's conviction of the substantive offense of attempting to bring six alien Japanese into the United States, in violation of the Immigration Act, was reversed, while his conviction on two counts, for conspiring to commit the same offense, was affirmed. The aliens had been transported by appellant's co-conspirators from Mexico to a point some forty miles off the mainland of the United States, where they were intercepted by the Coast Guard. Twelve overt acts, in connection with the offense, had been committed in the Southern District of California.

In reversing the conviction on the substantive count, the court (at p. 75) relied upon the "general rule of criminal law that the crime must be committed within the territorial jurisdiction of the sovereignty seeking to try the offense in order to give that sovereign jurisdiction." On the other hand, the judgment of conviction on the conspiracy count was affirmed because a "prosecution for conspiracy may be brought in the district where the unlawful agreement was entered into or where any of the overt acts took place" (p. 76).

The respondent does not contend that the offense was begun in one district and completed in another, or was committed in more than one district, or was of a continuing nature, within the purview of Title 18, U. S. C., § 3237. (See *United States* v. *Lombardo*, 241 U. S. 73, 77.)

B. By Eliminating the Distributive Shares Issue, the Trial Court Rendered it Impossible to Convict Livorsi or Giglio of Filing False Personal Returns

1. The respondent agrees (Gov. Br. No. 10, p. 37) that Livorsi's conviction of attempting to evade a large

part of his 1946 individual income tax cannot stand without proof of a tax deficiency. The concession is important. Equally significant, however, is respondent's failure to justify the contradictions and confusion injected into the case when the trial judge instructed the jury (R. 2714) both (a) to disregard the distributive shares issue and (b) at the same time to determine the corn syrup profits and whether the wives were partners, neither of which issues could be decided without determining the correct distributive shares of the partners (Pet. Br., No. 10, pp. 38-43).

The unlikelihood that any group of laymen would be able to apply the distributive shares concept to the facts of this case, even with an intelligible charge by the trial judge, evokes no comment from the respondent. We doubt that, even with an unexceptionable statement of the principles of law involved, any jury could have resolved what the court of appeals described as "this confusing problem in tax law" (R. 2971). In dismissing four counts of an indictment which charged an attempt to evade the tax and a conspiracy, the court, in *United States* v. *Klein*, 139 F. Supp. 135, stated (at p. 140):

> "It [the government] would have a lay jury in a criminal prosecution in essence make the type of allocation heretofore reserved for the technical skill of the Secretary of the Treasury in determining a civil liability for tax deficiency. So novel and unconscionable a procedure, this court summarily rejects. Even the technical skill of the Secretary has been repeatedly successfully challenged and the decisions still leave the question far from resolved."

Here, the initially complicated issue of distributive shares was rendered completely unintelligible by the contradictory and confusing charge of the court.

2. The respondent contends that evidence of understatement of income from sources other than Eatsum can support the verdict (Gov. Br. No. 10, pp. 40-1). This argument loses sight of the fact that Livorsi's duty to report income from these two additional sources (the Tavern partnership and the additional cars of corn syrup) rested squarely upon the distributive shares issue which the court took "out of this case" (R. 2714).

(a) *No income from the additional cars of corn syrup can be charged to Livorsi.* Lubben testified that when he left the partnership, one of the corn syrup refiners "owed" the Eatsum partnership over a million pounds of corn syrup at the ceiling price (R. 392). One carload of this syrup was shipped to Eatsum after Lubben left the partnership but the refinery refused to send any more (R. 392). Lubben said that he went West to plead for resumption of the shipments because Giglio threatened to charge the prospective profits against him (R. 392). Lubben finally arranged to have the corn syrup shipped to his own company so that he, in turn, could sell it to the Eatsum partnership. Four or five cars were shipped to Lubben's company and when they arrived Lubben received a penny a pound commission and paid the overage to Roth at the rate of about $8,000 a car (R. 393) or 83⅓¢ a pound (R. 395).

Roth testified that when Lubben left the partnership, there was an uncompleted contract for ten cars of corn syrup, with an estimated profit of approximately $25,000, and that Giglio, by arrangement with Lubben, permitted the latter to complete the contract and receive approximately 1¢ a pound for his efforts, the balance to be turned back to the partnership (R. 1028). Only about four or five of the cars were delivered and Roth stated that the *partnership* received the "benefit" of approximately $6,000 to $6,500 a car (R. 1030-1).

There was not the slightest suggestion by either of these witnesses, or by anyone else, that Livorsi actually received any of this money. The only conceivable theory upon which the government can charge him with any part of the proceeds is that, as a partner, he had a duty to report his distributive share of the profits. (See § 182, 1939 I. R. C.) Here again, proof of evasion rests upon the "confusing problem" (R. 2971) of distributive shares which the trial judge eliminated from the jury's consideration (R. 2714).

(b) *No income from the Tavern partnership can be charged to Livorsi:* Since Tavern was a partnership, Livorsi's duty to report income from this source depended upon the correct application of the distributive shares principle which the trial court took "out of this case" in his charge to the jury (R. 2714). Furthermore, it was the theory of the government that income attributed to the wives of Livorsi and Giglio, on Tavern's information return, should have been reported by the defendants because their wives were not, in fact, partners (R. 1887-8). This, too, was a problem in distributive shares.

3. The respondent suggests two "reasonable" interpretations of the trial judge's instructions that the jury "disregard any income they may have received from Eatsum" (R. 2731) in considering Count 5 which related to Giglio's personal income tax return and Count 6 which related to Livorsi's personal income tax return (Gov. Br. No. 10, pp. 40-1). It is also entirely "reasonable" to make a third assumption, namely, that when the trial judge told the jury to "disregard any income they [the defendants] may have received from Eatsum," he meant exactly what he said, namely, that they disregard the income from Eatsum, in the sum of $228,288.58, attributed to each of the defendants by government witnesses and exhibits (esp. Exs. 150, 151).

If these simple words mean exactly what they say, the defendants could not be convicted on this count (Pet. Br. No. 10, pp. 43-4).

In any event, the present discussion establishes beyond dispute that the defendants were seriously prejudiced by an "equivocal direction to the jury on a basic issue" (*Bollenbach* v. *United States*, 326 U. S. 607, 613). The respondent does not deny that the issue "was the real question in this lawsuit," as conceded by the government's expert (R. 1951), and that the court's instructions on that issue were both equivocal and confusing.

C. There Was No Evidence That Livorsi Attempted to Defeat and Evade a Corporate Tax by the Misappropriation or Diversion of Assets

We have established (Pet. Br. No. 10, p. 53) that the testimony against Livorsi, on this count, consisted of computations, purportedly taken from the corporate books and read at the trial by a government agent (R. 1916-23). The respondent's answer is contained in the final sentence of a footnote (Gov. Br. No. 10, p. 42) which reads:

> "It should be noted that these 1947 withdrawals were not mere bookkeeping entries, as Livorsi suggests (Br. 53), because the money disappeared from view (R. 2206)."

The fact that the money disappeared from view, if true, has nothing whatever to do with another fact, namely, that the government proved merely that it had been charged against Livorsi on the books of the corporation. The respondent has failed to point to any testimony in this record to the effect that Livorsi actually received any of this money. The respondent refers (Gov. Br. No. 10, p. 43) to Roth's testimony that under Giglio's instructions he drew a check each week and charged it "arbitrarily and falsely to expense

accounts, and gave Giglio the cash." The respondent then asserts that the jury could have reasonably inferred that Livorsi received half of these amounts because he was a 50% owner of the enterprise, entitled to half the profits. Under this odd theory, all members of a partnership, entitled to share in its profits, become criminally liable, *ipso facto*, for misappropriation by one of the partners.

The respondent also urges (id.) that Roth's testimony to the effect that Giglio tried to hide some of his own withdrawals from Livorsi, would permit a jury to infer that Livorsi kept "a careful eye on the funds" (Br. p. 43) which, in turn, would permit a jury further to infer that Livorsi received half of any amounts drawn from the company by Giglio. The fact that no authority is cited for these bizarre legal concepts, indicates that none exists.

It is significant that the respondent has not even attempted to explain how the jury was justified in convicting Livorsi under the court's charge (R. 2717-8) which required that they be convinced beyond a reasonable doubt that he knew that a corporate tax was due for 1946, that it was not paid, that he intentionally kept the corporation from paying its taxes, that he "made it impossible to collect the taxes by concealing the assets of that corporation or by misappropriating and diverting the assets of that corporation * * *" and that, if he had not so concealed the assets, the corporate tax could have been collected when it was due. The stubborn fact is that the prosecution failed to establish a single one of these basic requirements.

D. The Government Failed to Prove That Livorsi Participated in a Conspiracy

The respondent seeks to create an atmosphere of conspiracy out of the following "facts" (Gov. Br. No. 10, pp. 44-6): Giglio and Livorsi were fifty-fifty owners of all of the enterprises, with one exception; Giglio was

accountable to Livorsi for half the profits; Livorsi signed unusual or "special" checks so that both he and Giglio would know what they were for;* Giglio had to resort to false entries when he wanted to withdraw money from the business without Livorsi's knowledge. Despite the total absence of proof that Livorsi actually received any of the unreported income from Eatsum, from Tavern, from the five additional cars of corn syrup or any of the proceeds of the weekly drawings charged to expense account, respondent maintains that the jury was entitled to infer that he received his 50% share of the unreported income from Tavern and from the five additional cars of corn syrup sold after Lubben's departure, and that the jury was entitled to infer further that Giglio was obliged to, and did, turn over to Livorsi his 50% share of the proceeds of weekly checks which Roth charged to expense accounts at Giglio's direction. As we have seen, none of these "facts" establishes the commission of a crime by Livorsi; the "inferences" sought to be drawn are far-fetched and unwarranted.

The fact that Livorsi filed his 1946 individual income tax return about September 15, 1947, at the same time as the partnership and corporation returns were filed, results from the circumstance that Roth, the accountant, prepared all of the returns and caused them all to be filed (R. 1076, 1247-9). It is of the utmost significance that Roth, who was co-operating with the government at the trial (R. 1216) in order to save his own skin, failed to mention any conversation with Livorsi, any admission by him, or any conduct on his part (except his signature), relating to the return; not a single word or gesture on

*At the trial only *one* such item was produced. It was a check for $15,600 which the government allowed as a *deduction* to Tavern, reducing its taxable income. Roth, the witness who identified the check, neither described nor identified any other (R. 1073).

the part of Livorsi indicating an intent to defraud or a wilful attempt to defeat or evade the tax. The absence of such testimony is the clearest indication that Livorsi merely signed a return which was prepared for him and filed for him by the accountant, that he had no intention to defeat or evade the tax and that he was not engaged in a conspiracy with Roth or with anyone else. The fact that Livorsi subsequently cashed a check in New Jersey and received the proceeds and pocketed them (if it constitutes the crime of concealment) falls far short of establishing that he was acting in concert with the other defendants as alleged in Count 10 of the indictment.

The respondent has put together every adverse fact and circumstance available in order to justify a fifteen-year sentence against the petitioner Livorsi. At the very outset of its summary (Gov. Br. No. 9, pp. 6-7) appears the statement that "Louis Roth, an accountant, had been hired by petitioners Giglio and *Livorsi* to 'legitimatize' money they had made. (R. 1235.)" [Emphasis added] This statement, with respect to Livorsi, is completely without foundation. Roth testified that the alleged conversation took place not with Livorsi but with Giglio alone (R. 1235). There is no evidence in this record that Roth was hired by Livorsi to "legitimatize" money, or for any other purpose.*

*Indeed, the respondent has fine-combed the record in a vain attempt to establish Livorsi's guilt, mentioning that Giglio, in the presence of Livorsi, ordered Lubben to "get the hell out of the office" when he asked for his share of the Eatsum profits (Gov. Br. No. 9, p. 10); that Livorsi had no separate office of his own, being in charge of jelly production at the Tavern plant (id., p. 12); that Livorsi invariably conferred with Giglio when he came to 1 Rector Street (id., p. 13); and that in mid 1953, after the first indictments were found, Roth told Giglio and Livorsi that he wanted to have his own counsel, that Giglio charged Roth with failure to keep the books properly and Roth told Giglio "in front of Mr. Livorsi" that the fault was "our depending on" certain taxpayers' influence (id., p. 27). The relationship between these items and the offenses alleged in the indictment against Livorsi is not defined.

The "evidence" which the government has so carefully marshalled to support the verdict (Gov. Br. No. 9, pp. 5-28) demonstrates, far more effectively than anything we have said, that Livorsi was guilty of none of the four crimes alleged against him in the indictment.

III.

THIS COURT SHOULD TAKE COGNIZANCE OF PLAIN ERROR CONSISTING OF THE REFUSAL OF THE DISTRICT COURT TO REQUIRE THE GOVERNMENT TO PRODUCE DOCUMENTS TO BE USED IN CONNECTION WITH THE CROSS-EXAMINATION OF LUBBEN

The refusal of the district court to require the government to turn over to the defendants, Lubben's tax returns, his grand jury testimony and his statements to Treasury agents, constitutes fundamental error which requires a reversal of the judgments of conviction.

The respondent, conceding that Lubben was one of its principal witnesses (Gov. Br. No. 10, p. 51), urges that defendants did not demand the papers until "after five days" of cross-examination* (id., p. 53), and that the ruling of the trial court was based upon its discretion to limit excessive interrogation (id., p. 55). The record flatly refutes this contention. The cross-examination of Lubben began in the afternoon of Monday, January 17, 1955 (R. 406; 413). At the close of that very session, defendants applied to the court for the production of his tax returns and

*The prosecutor refers to Lubben as an "ill and frightened" witness (Gov. Br. No. 10, p. 55). A sampling of his answers demonstrates that he was not only a crafty witness, but a defiant and arrogant one as well (see, e.g., R. 415, 432, 467, 476-481, 493, 537, 544, 636, 685-7, 689, 701), quite capable of brazenly lying about his signature to two "pertinent letters" when called as a witness in behalf of the prosecution in a criminal case (*State* v. *Weleck*, 34 N. J. Super. 267, 112 A. 2d 23, 24).

for statements he may have made to government agents (R. 452-3). The court and prosecutor suggested that first Lubben should be questioned about these matters (R. 454). Then followed the interrogation (R. 461-473, 684-5) which we have summarized in our main brief (Pet. Br. No. 10, pp. 62-3). The defendants then renewed their request for Lubben's 1946 income tax return (R. 710-11), requested that Lubben's grand jury testimony be examined by the court (R. 731) and that his statements to the agents be made available (R. 731). The court refused the request not on the ground that the cross-examination had proceeded too far, but because "I don't see any basis for it now, Mr. Stryker" (R. 731). The cross-examination of Lubben continued for approximately 170 printed pages further, at which point counsel renewed his request (R. 906). The prosecutor opposed on the ground that "there is * * * absolutely no foundation in this record that in any of these statements * * * there is any inconsistent statements, taken inconsistent with the witness' present testimony" (R. 906). Defendants' counsel responded that "whether or not he is correct is a question concerning which I should not be bound by the mere statement of the prosecutor, but that I should be enabled to determine whether or not in any of these statements this witness has said anything that is inconsistent with his testimony here" (R. 907-8). The court ruled that it saw "no basis for producing any further documents on the basis of what I have heard here; and Mr. Wessel's statement simply supports my conclusion that I would otherwise have come to" (R. 908). In other words, the ruling of the court was predicated not upon its discretionary power to limit the cross-examination, but on the ground that it could decide, without examining the papers, supported by the prosecutor's representation, that there was no inconsistency between them and Lubben's testimony.

In *Jencks* v. *United States*, 353 U. S. 657, the government similarly opposed defendant's motion to require the

production of the witnesses' reports to the F. B. I. "upon the sole ground that a preliminary foundation was not laid of inconsistency between the contents of the reports and the testimony of Matusow and Ford" (p. 666). This Court held (*id.*) that "the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony." The fundamental principle underlying this Court's decision in *Jencks* applies equally to the present appeal (p. 668):

> "A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. For the interest of the United States in a criminal prosecution '* * * is not that it shall win a case, but that justice shall be done.'"

Respectfully submitted,

JAMES B. BURKE,
Counsel for Petitioners.

HAROLD W. WOLFRAM,
JOSEPH LEARY DELANEY,
Of Counsel